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No.....

In The

Supreme Court of the United States

October Term, 1984

—o—

METROPOLITAN LIFE INSURANCE COMPANY,

Petitioner,

vs.

JEAN KELLEY,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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December 28, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts' failure in a diversity action to provide standards for the review by Article III judges of proceedings before a magistrate under 28 U.S.C. § 636 violates Article III of the U.S. Constitution and denies due process to defendant.

2. Whether the federal courts' refusal on equitable grounds to invoke res judicata violates the federal courts' obligation to give full faith and credit to a state court decision.

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METROPOLITAN LIFE INSURANCE COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The order of the Court of Appeals denying leave to appeal is Appendix A to this petition for writ of certiorari. The earlier opinion of the Court of Appeals and the memorandum decisions in the District Court for the Eastern District of Washington are Appendixes B through E to this petition for writ of certiorari. None of the decisions have been published.

JURISDICTION

The order of the Court of Appeals for the Ninth Circuit denying petitioner's petition for permission to appeal

was entered on October 9, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The statute authorizing trial before a magistrate also provides for review in this Court. 28 U.S.C. § 636(b)(5).

STATUTORY PROVISIONS INVOLVED

United States Constitution:

Article III

Article IV, Section 1

Amendment V

United States Code, Title 28:

§ 636. Jurisdiction, powers, and temporary assignment

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

Oregon Revised Statutes:

§ 40.120 (Oregon Evidence Code, Rule 308)

§ 40.130 (Oregon Evidence Code, Rule 311)

The pertinent text of these provisions is set forth in Appendix F.

STATEMENT UNDER RULE 28.4(b)

This proceeding draws into question the constitutionality of 28 U.S.C. § 636, an Act of Congress affecting the public interest. Neither the United States nor any of its agencies, officers, or employees is a party. Therefore 28

U.S.C. § 2403(a) may be applicable. No court of the United States as defined by 28 U.S.C. § 451 has certified to the Attorney General pursuant to 28 U.S.C. § 2403(a) that the constitutionality of such Act of Congress has been drawn into question.

STATEMENT OF THE CASE

1. Richard Keith Kelley Disappears in 1970.

On Saturday, April 18, 1970, Richard Keith Kelley left his home in Klamath Falls, purportedly to "fix" a traffic ticket in Redmond, Oregon. Later in the day, Mr. Kelley signed the name "Fred Hall" to gas credit card receipts in Eugene and Grants Pass, Oregon. Neither Eugene nor Grants Pass is on any route from Klamath Falls to Redmond, but both towns are on the route from Klamath Falls to Forest Grove, Oregon. In late 1969, Mr. Kelley had renewed his relationship with a woman living in Forest Grove. This woman's maiden name had been "Hall."

Mr. Kelley never returned home.

Two weeks later, Mr. Kelley's pickup truck was found in Redding, California. The truck was locked and clean. Mr. Kelley's electrician's tools were missing. There were no fingerprints in the truck, either because of weather conditions or because the cab had been wiped clean.

Mr. Kelley's wife and daughter found two small stains in the bed of the pickup. They believed the stains might be blood. The Klamath Falls police officer who investigated their discovery testified that the stains were very small and appeared quite old and dusty. The truck had

been used to transport an elk four or five months previously. The scrapings from the stains taken by the Klamath Falls police officer were lost before they could be analyzed. There was no scientific evidence that the stains were blood of any type.

2. Mrs. Kelley Loses Suit In Oregon In 1972 To Recover On Group Life Policy.

Mr. Kelley's employer provided a group life insurance policy through Metropolitan Life Insurance Company. Mr. Kelley's coverage under the policy, in the amount of $27,500, expired on July 11, 1970. In order to collect under the policy, Mrs. Kelley had to prove that Mr. Kelley was dead and that he had died before July 11, 1970.

In 1972, Mrs. Kelley brought suit in Grant County, Oregon against Metropolitan to recover the proceeds of the policy. Mrs. Kelley's Oregon case was tried to a jury in 1973. The jury returned a general verdict for Metropolitan. Mrs. Kelley did not appeal.

3. Mrs. Kelley Starts Second Suit In 1977.

In 1977, Mrs. Kelley filed a second suit on the policy in Walla Walla County, Washington. Metropolitan transferred the suit to the Federal District Court, Eastern District of Washington, on the basis of diversity jurisdiction. 28 U.S.C. § 1332.

4. Mrs. Kelley Granted Summary Judgment: Ninth Circuit Reverses.

On March 31, 1978, Senior Judge Curtis granted plaintiff's motion for summary judgment, ruling that Metropolitan was required to pay on the policy because Mr. Kel-

ley was legally dead under Oregon's statutory presumption of death after seven years' disappearance. Metropolitan appealed to the Ninth Circuit Court of Appeals. The Court of Appeals reversed and remanded on September 16, 1980.

The Court of Appeals reasoned that the presumption of death did not eliminate the factual issue of the *time* of Mr. Kelley's death. The Ninth Circuit further noted that it was not deciding whether the 1973 Oregon decision barred Mrs. Kelley's claim:

> The trial judge, in this federal action, rejected the defendant's contention that the doctrines of res judicata and collateral estoppel applied. The trial judge reasoned that the applicability of the above-mentioned presumption of death so substantially altered Kelley's burden of proof that the doctrine should not bar the decision. We need not, nor do we rule on that decision. The District Court has the opportunity to consider those contentions, again, on remand.

A copy of the Ninth Circuit's memorandum decision is Appendix B.

5. Parties Stipulate To 28 U.S.C. § 636 Magistrate Procedure: Magistrate Grants Motion To Dismiss.

On remand, the parties stipulated to trial proceedings before a magistrate and to appeal to the District Court under 28 U.S.C. § 636. On June 10, 1981, the magistrate granted Metropolitan's motion to dismiss on the grounds of the res judicata and collateral estoppel effect of the 1973 Oregon judgment. The magistrate reasoned that Oregon would give the decision res judicata effect, because the same evidence was necessary for decision in both the Oregon and federal court actions:

> The plaintiff must now show that Richard Kelley is dead or presumed dead and that Kelley died while the insurance policy on his life was in force. Certainly the proof of these two issues is made easier by the statutory presumption of death but the degree and the difficulty or ease of proof is not the controlling principle. Therefore, the magistrate reluctantly concludes that Mrs. Kelley's present action in federal court is barred by the doctrine of res judicata.

The magistrate also held that collateral estoppel would apply to defeat Mrs. Kelley's decision. A copy of the magistrate's memorandum decision is Appendix C.

6. District Court Reverses Magistrate: Ninth Circuit Refuses Appeal.

The plaintiff appealed the magistrate's decision to the Federal District Court. The district court judge noted in his decision that this case was the first "in this district involving an appeal from a decision of the magistrate," and that the court "had not yet promulgated rules governing appeals from the Magistrate." District Judge McNichols reversed the magistrate because he "disagreed" with the magistrate's decision.

Judge McNichols ruled that because of the Oregon evidentiary presumption that Mr. Kelley had died after a seven-year disappearance, plaintiff's action was not barred. Judge McNichols believed that it would be inequitable to apply res judicata to prevent Mrs. Kelley from bringing her action because of the presumption of death that had arisen since the first trial. A copy of Judge McNichols' decision is Appendix D.

Metropolitan appealed Judge McNichols' decision. The Ninth Circuit Court of Appeals, considering the

Notice of Appeal as a petition for leave to appeal, denied leave to appeal and remanded to the District Court for further proceedings.

7. Jury Trial Before Magistrate: Mrs. Kelley Prevails.

In June 1983, the matter was tried to a six-person jury, before a federal magistrate. Almost all of the evidence from the 1973 trial in Oregon was read into the record. Only Mrs. Kelley, her daughter, and one family friend testified in person. The magistrate instructed the jury that Mr. Kelley was dead, and that the jury need only determine whether Mr. Kelley had died before July 11, 1970. The magistrate believed that the issue of death had been "decided" by the Ninth Circuit's decision reversing Judge Curtis' first summary judgment. The magistrate refused to present the issues of res judicata and collateral estoppel to the jury for consideration. The jury returned a verdict for the plaintiff.

8. Metropolitan Appeals To District Court Which Affirms.

Metropolitan appealed to the District Court. District Judge Quackenbush affirmed the judgment on June 20, 1984. Judge Quackenbush declined to reconsider the applicability of res judicata and collateral estoppel because he believed that Judge McNichols' earlier decision remanding the matter for trial after reversal of the magistrate's summary judgment was the "law of the case." A copy of Judge Quackenbush's memorandum decision is Appendix E.

9. Ninth Circuit Refuses Appeal By Metropolitan.

Metropolitan petitioned for leave to appeal in the Ninth Circuit after denial of its motion to Judge Quackenbush for reconsideration. The Ninth Circuit denied leave to appeal on October 9, 1984. The Ninth Circuit's order stated that Metropolitan "has failed to demonstrate that the issues to be raised on appeal are substantial enough to warrant review or that review is necessary to serve the ends of justice." The Ninth Circuit has not promulgated any standards for appeal from a magistrate's decision. The Ninth Circuit's one-paragraph order in this case cites Eighth Circuit Rule 28(a), which sets general standards for granting leave to appeal from a magistrate's decision in that Circuit. A copy of the Order is Appendix A.

REASONS FOR GRANTING THE WRIT

1. The Decisions Below Violate Article III Of The Constitution And Deny Defendant Metropolitan Due Process Because There Are No Standards For Review Of A Magistrate's Decision By Article III Judges. This Court Should Exercise Its Supervisory Powers And Require Standards For The Review Of Magistrates' Decisions That Allow Proper Consideration Of The Facts And Law In Each Case.

There are no criteria for either District Court review of magistrates' decisions or Court of Appeals review of District Court appeals from magistrates' decisions in the Ninth Circuit. The District Court judge reversed the magistrate's summary judgment for Metropolitan merely because he "disagreed" with the magistrate's decision. In

the order denying Metropolitan permission to appeal, the Ninth Circuit cited for the first time an Eighth Circuit rule that sets out specific criteria for review. Metropolitan was not afforded adequate notice of grounds for review of the magistrate's decisions in either instance, and the procedure below violates Article III of the United States Constitution and Metropolitan's due process rights under the Fifth Amendment to the United States Constitution.

The constitutionality of decision-making by magistrates depends upon appropriate standards for review of these decisions by Article III judges. This Court noted that the existence of explicit de novo review in the district court prevented the pre-1979 Magistrate's Act from being unconstitutional in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982). With the advent of final magisterial decision-making subject to District Court appeal in the 1979 amendments to the Act, there are no longer adequate standards for review under the Magistrate's Act. The district court felt free to ignore the analysis undertaken by the magistrate, while the Ninth Circuit refused to consider the legal issues raised on the basis of strict standards for review which the appellant could not have known until the order denying review was issued.

The need for standards on review by Article III judges is particularly critical in this case, where the federal courts have obtained jurisdiction because of diversity. The Court is especially sensitive to the parties' rights to have decisions under state law properly considered by an Article III judge:

> [T]he cases before us . . . involve a right created by *state* law, a right independent of and antecedent to the reorganization petition that confers jurisdiction upon the Bankruptcy Court. Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art III "adjunct," plainly must be deemed at a minimum.

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra, 458 U.S. at 84 (emphasis in original) (footnote omitted).

Metropolitan was caught in the no man's land created by the lack of standards for review of a magistrate's dispositive decisions under the 1979 Magistrate's Act. Metropolitan was entitled to explicit and previously-promulgated standards for examination of the magistrate's decisions because only in this way can the integrity of magisterial decision-making as an adjunct to Article III courts be preserved. The failure to provide written, previously-established standards of review violates Metropolitan's due process rights. *United States v. Raddatz,* 447 U.S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950).

This Court should grant review to consider whether the failure to provide standards for review of a magistrate's decision by Article III judges violates Article III of the U.S. Constitution and Metropolitan's due process rights under Amendment V of the United States Constitution. This Court should exercise its supervisory powers over the federal courts and require standards for the review of magistrates' decisions that allow proper consideration of the facts and law in each case.

2. The Decisions Below Unconstitutionally Failed To Give Full Faith And Credit To The Decision Of A State Court. This Court Should Exercise Its Supervisory Powers To Prevent Violation Of The Full Faith And Credit Clause On The Grounds Of "Equity".

The federal courts in this case violated their duty to give full faith and credit to the 1973 decision of the Oregon court. The failure to apply res judicata was unconstitutional under Article IV, Section 1 of the United States Constitution, and 28 U.S.C. § 1738, and denied Metropolitan its right to rely on the finality of the 1973 Oregon decision.

The United States Constitution and 28 U.S.C. § 1738 require the federal courts to give to "judicial proceedings . . . the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." As applied to the relitigation of claims, this Court has ruled that a final judgment on the merits of an action prevents the parties from relitigating issues that were or could have been raised in the earlier action. *See, e.g., Kremer v. Chemical Construction Co.*, 456 U.S. 461, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982).

This Court discussed the compelling importance of res judicata as a doctrine of equity and public policy in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). In *Moitie*, the Ninth Circuit refused to apply res judicata to an earlier federal judgment, on the grounds that an appeal by other parties to the earlier judgment had resulted in a reversal for the appealing parties. The Ninth Circuit concluded that "the doctrine of res judicata must give way to 'public policy' and 'simple justice' ", and refused to apply res

judicata against parties who had not appealed the earlier judgment. *Federated Department Stores, Inc. v. Moitie, supra,* 452 U.S. at 398. This Court granted certiorari and reversed. In doing so, this Court stated that the "Court of Appeals' novel exception to the doctrine of res judicata" in fact violated public policy:

> There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata.*" *Heiser v. Woodruff,* 327 U.S. 726, 733 (1946). The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin v. Traveling Men's Association,* 283 U.S. 522, 525 (1931).

Federated Department Stores, Inc. v. Moitie, supra, 452 U.S. at 401.

In this case, the public policy requiring res judicata has constitutional dimensions that were ignored by the Ninth Circuit. The magistrate correctly concluded that Oregon would give res judicata effect to its judgment in this case. The District Court refused to apply res judicata because it believed that application of the doctrine would be inequitable. Any inequity, however, arose from the unconstitutional refusal to give full faith and credit to Oregon's judgment. *Federated Department Stores, Inc. v. Moitie, supra.*

Nothing required Mrs. Kelley to bring her action in Oregon in 1972. She chose not to take advantage of the Oregon statutory presumption of death after seven years.

She must be bound by her decision and the decision of the Oregon jury, just as Metropolitan had a right to rely upon it:

> The predicament in which respondent finds himself is of his own making . . . . [W]e cannot be expected, for his sole relief, to upset the general and well-established doctrine of *res judicata*, conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of precedent for so regarding this salutary doctrine against prolonging strife would be greater than the benefit which would result from relieving some case of individual hardship.

Reed v. Allen, 286 U.S. 191, 198-99, 76 L. Ed. 1054, 52 S. Ct. 532 (1932), quoted in *Federated Department Stores, Inc. v. Moitie, supra*, 452 U.S. at 401-02.

The Oregon jury trial was held in 1972, well after the July 11, 1970, expiration of the Metropolitan group life policy. The jury's general verdict in favor of Metropolitan was either based on a determination that Mr. Kelley was not yet dead, or that he died after July 11, 1970. Either determination precluded a relitigation of the time of death in federal court because of the principles of res judicata and collateral estoppel.

The earlier decision of the Ninth Circuit on the effect of the presumption of death was either incorrect or misinterpreted by the district court. Under Oregon law, disappearance for seven years does not give rise to a conclusive presumption of death. Oregon's presumption of death after seven years is simply an evidentiary rule. Or. Rev. Stat. § 40.130 (Evidence Code Rule 311). The pre-

sumption of death is rebuttable. Or. Rev. Stat. § 40.120 (Evidence Code Rule 308). Even if res judicata did not bar a redetermination of this case after the 1972 Oregon decision, the jury should have determined both the question of death and the question of time of death.

This Court should grant review to consider the lower courts' unconstitutional refusal to give full faith and credit to the decision of the Oregon courts.

———o———

CONCLUSION

For the reasons discussed above, a writ of certiorari should issue to review the judgment and opinions in the Ninth Circuit and in the Eastern District of Washington.

December 28, 1984

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-8144

DC CV-77-159 SPM
Eastern Washington

JEAN KELLEY,

Plaintiff-Respondent,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,

Defendant-Petitioner.

ORDER

(Filed October 9, 1984)

Before: GOODWIN, TANG and FERGUSON, Circuit Judges

Defendant's petition for permission to appeal under 28 U.S.C. § 636(c) (5) is denied. Defendant has failed to demonstrate that the issues to be raised on appeal are substantial enough to warrant review or that review is necessary to serve the ends of justice. *See* 8th Cir. R. 28(a).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-2340

D.C. No. C-77-159

JEAN KELLEY,

Plaintiff-Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Defendant-Appellant.

MEMORANDUM

(Filed September 10, 1980)

On Appeal from the United States District Court
for the Eastern District of Washington

Before: ELY and POOLE, Circuit Judges and
REDDEN,* District Judge

Defendant, Metropolitan Life Insurance Company (Metropolitan) appeals the grant of a summary judgment in favor of plaintiff, Jean Kelley (Kelley).

In 1977, Kelley filed this action seeking the proceeds of a life insurance policy after her husband disappeared. The action was filed more than seven years after his dis-

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*Honorable James A. Redden, United States District Judge for the District of Oregon, sitting by designation.

appearance. Metropolitan contended that there was no proof that Mr. Kelley died on or before July 11, 1970, the expiration date of the policy.

The district court granted Kelley's motion for summary judgment. Kelley relied on the presumption that a person not heard from in seven years is dead. O.R.S. 41.360(26).[1]

Metropolitan appealed from that judgment.

The critical issue is whether Mr. Kelley died before the expiration of the policy. He was last seen on April 18, 1970, when he left his residence in Klamath Falls, presumably bound for Redmond, Oregon. Extensive searches for him were conducted but to no avail. His blood-smeared pickup truck was found in Redding, California on April 20, 1970; this information was transmitted to the Klamath Falls police on May 2, 1970.

Kelley submitted evidentiary affidavits on this issue which, in addition to the aforementioned presumption, effectively established the fact of Mr. Kelley's death. The affidavits, however, do not establish the absence of a genuine issue of material fact as to the specific date of death.

---

[1] This is the second action filed by Kelley, against Metropolitan seeking payment of the policy proceeds. The first, filed in state court in Oregon, resulted in a defendant's verdict on June 15, 1973. The trial judge, in this federal action, rejected the defendant's contentions that the doctrines of *res judicata* and collateral estoppel applied. The trial judge reasoned that the applicability of the above mentioned presumption of death so substantially altered Kelley's burden of proof that the doctrines should not bar the action. We need not, nor do we rule on that decision. The district court has the opportunity to consider those contentions, again, on remand.

All reasonable doubts as to the existence of a genuine issue of material fact should be resolved against the moving party. *Hector v. Wiens,* 533 F.2d 429, 432 (9th Cir. 1976). The party opposing summary judgment is entitled to all favorable inferences which can be drawn from the evidence. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 158-59 (1970).

Inferences favorable to Metropolitan can be drawn from the affidavits submitted in support of Kelley's motion for summary judgment. Because Kelley failed to establish that there were no genuine issues of material fact as to the date Mr. Kelley died, the grant of summary judgment was improper.

REVERSED AND REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Civil No. C-77-159

JEAN KELLEY,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant,

OPINION AND ORDER RE: MOTION TO DISMISS

(Filed June 10, 1981)

Defendant has moved for the following orders:

a) Dismissing plaintiff's complaint based upon an application of the doctrine of res judicata and/or collateral estoppel.

b) Declaring that issues of res judicata, collateral estoppel, burden of proof as to death and time of death and damages are governed by the laws of Washington.

c) Striking plaintiff's prayer for punitive damages.

d) Striking plaintiff's prayer for attorney's fees.

e) Allowing defendant to file in support of the motion the Reporter's Transcript of the original trial.

Oral argument was heard in this matter on May 18, 1981, by means of a conference call. The parties have consented in writing that the Magistrate may exercise full jurisdiction in this case. The Magistrate having carefully reviewed the files, the applicable law, and the arguments of counsel now enters the following opinion and order:

Case History

On April 18, 1970, Richard Keith Kelley left his home in Klamath Falls, Oregon, bound for Redmond, Oregon. The purpose of his trip was to appear at court to seek reduction of a traffic fine. Mr. Kelley never arrived at Redmond, nor has he been seen or heard from since that day.

Upon extensive investigation by numerous police agencies, the Federal Bureau of Investigation, private investigators and the plaintiff's own efforts, the events surrounding the disappearance of Mr. Kelley have been partially uncovered. It is known that on April 18, 1970, Kelley purchased gasoline by use of a credit card in Klamath Falls, Eugene and Grants Pass, Oregon. In Eugene and Grants Pass, Kelley signed the gas receipt using the name Fred Hall. In early May of 1970 the California State Police notified the Klamath Falls Police that an abandoned vehicle matching the description of Kelley's vehicle had been found in a city parking lot in Redding, California. Subsequent investigation and examination revealed that the truck was devoid of fingerprints and debris in the cab. Blood smears were found in the truck bed, but the smears were either lost or incapable of being analyzed. No other clues or leads as to the existence or whereabouts of Mr. Kelley have ever been found.

At the time of his disappearance, Mr. Kelley was in the employ of Pacific Power & Light Company. As an employee of Pacific Power, Kelley was covered by a group life insurance policy issued by the defendant, Metropolitan Life Insurance Company. This coverage continued after his disappearance until July 11, 1970. The named beneficiary of the policy was the plaintiff, Jean Kelley. At the time of his disappearance the principal amount of insurance covering Kelley was $27,500.

The plaintiff submitted a claim to the defendant for the insurance benefits. The claim was denied by the defendant on the grounds that proof of death was not shown. Consequently, in 1972 Jean Kelley initiated a lawsuit in the Circuit Court of the State of Oregon in Grant County, Cause No. L-5521, against the Metropolitan Life Insurance Company seeking to collect the insurance benefits. The matter was tried to a jury which returned a verdict in favor of the defendant. A certified copy of the file in the Oregon case is on file in the present case and has been considered.

On April 15, 1977, the plaintiff filed a second suit seeking payment of the insurance benefits. This latter suit was filed in the Superior Court for the State of Washington in Walla Walla County, Cause No. 68690. The named defendant in the second suit was again the Metropolitan Life Insurance Company. On May 23, 1977, the action was removed to this court on the grounds of diversity of citizenship. 28 U.S.C. § 1332.

On March 31, 1978, the Honorable Jesse W. Curtis granted plaintiff's motion for summary judgment and awarded the plaintiff the sum of $27,500 with interest.

The decision of Judge Curtis was reversed and remanded by the Court of Appeals for the Ninth Circuit on September 10, 1980. The present motion to dismiss was filed on May 11, 1981.

Applicable Law

The initial issue presented to the Magistrate is whether Washington or Oregon law shall govern this controversy. The plaintiff argues that Oregon law should govern under the ruling of *Baffin Land Corp. v. Monticello Mot. Inn,* 70 Wn. 2d 893, 425 P.2d 623 (1967). Defendant in its responsive memorandum does not dispute that *Baffin* is controlling but rather argues that equity requires application of Washington law. The Magistrate is convinced that the *Baffin* case is controlling and consequently Oregon law governs this matter.

The pivotal issue is whether the doctrine of res judicata and collateral estoppel bar the present action. By way of explanation, Judge Curtis indicated in his opinion that the present litigation did not concern the same factual question that was addressed by the jury in the initial lawsuit. The Court of Appeals refrained from deciding the res judicata and collateral estoppel issues but indicated that the district court had the opportunity to consider those arguments on remand.

The Oregon law as to what constitutes a cause of action for res judicata purposes is a little unsettled. Prior to 1975 the law required application of the "same evidence test." *Western Baptist Home Mission Board v. Griggs,* 248 Or. 204, 433 P.2d 252 (1967). Under the "same evidence test" it must be decided "whether the second action is based upon the same transaction and the evidence

needed to sustain the second action would have sustained the first." 248 Or. at 210, 433 P.2d at 255. In 1975 the Oregon Supreme Court changed the test in *Dean v. Exotic Veneers, Inc.*, 271 Or. 188, 531 P.2d 266 (1975). In *Dean* the court defined a cause of action for res judicata purposes as "an aggregate of operative facts which compose a single occasion for judicial relief." 271 Or. at 196, 531 P.2d at 270. The new "aggregate operative facts test" was to be applied prospectively. The Magistrate is convinced that if the "aggregate operative facts test" were to be utilized in deciding the issues before the court then the doctrine of res judicata would apply and the plaintiff's action dismissed.

The appropriate test to be used is the "same evidence test." The reason is that at the time plaintiff's Oregon action was litigated the law provided that the "same evidence test" would determine what constituted a cause of action. Thus plaintiff had a right to rely on that test being utilized in judging whether any subsequent action brought by her would be barred by the previous Oregon action. *Del Monte Meat Co., Inc. v. Hurt*, 277 Or. 615, 561 P.2d 627 (1977). The difficulty in applying the "same evidence test" is in ascertaining the clear meaning of the test.

An instructive case on ascertaining the meaning of the "same evidence test" is *Waxwing Cedar Products Ltd. v. Koennecke*, 278 Or. 603, 654 P.2d 1061 (1977). In *Waxwing* the plaintiff was seeking a rebate of rent paid to the defendant. Previously in another action the plaintiff had successfully sued the same defendant on a replevin action involving the same leased property. The *Waxwing* court held that under the same evidence test the rent rebate

action would not be barred by res judicata despite the early replevin action. The court reasoned that to sustain the rebate action (the second action) the plaintiff

> had to show the lease, the payment of rent for August, and the wrongful withholding of possession of the leased property by defendant. . . . 564 P.2d at 1065.

This same evidence would not have sustained the plaintiff's prior action for replevin. Thus in applying the "same evidence test" the court defines a cause of action for res judicata purposes by analyzing what issues must be proven to sustain a certain action.

In the instant case two issues had to be proven in the Oregon action. The first issue was whether Richard Kelley was dead or could be presumed to be dead. The second issue was whether he died while the policy was still in force. The Magistrate believes the same two issues exist in the present case. The plaintiff must now show that Richard Kelley is dead or presumed dead and that Kelley died while the insurance policy on his life was in force. Certainly the proof of these two issues is made easier by the statutory presumption of death but the degree in the difficulty or ease of proof is not the controlling principle. Therefore, the Magistrate reluctantly concludes that Mrs. Kelley's present action in federal court is barred by the doctrine of res judicata.

Additionally, it is felt that even if the bar of res judicata could somehow be evaded, the doctrine of collateral estoppel would still prohibit Mrs. Kelley from going forward with this action. In the present case, the issues of whether Richard Kelley is dead and, if he is dead, whether he died while the life insurance policy was in force were actually litigated and necessarily determined

by the jury in the Oregon action. This being the case, the doctrine of collateral estoppel is applicable and bars relitigation of these same issues in this subsequent action. *Waxwing, supra,* 564 P.2d at 1065; *Western Baptist, supra,* 433 P.2d at 255.

Plaintiff's Argument

The plaintiff argues that neither of the doctrines referred to above should be applied in this case due to the qualitative difference between the present action and the Oregon action. In support of her position plaintiff cites *Bordeaux v. Ingersoll Rand Co.,* 71 Wn. 2d 392, 424 P.2d 207 (1967) and *Standlee v. Smith,* 83 Wn. 2d 405, 518 P.2d 721 (1974). These cases are distinguishable from the instant one. In *Bordeaux* the court refused to apply the doctrine of res judicata due in part to a qualitative difference in the two parties to the action. Initially the claim for compensation in the *Bordeaux* case was in a nonadversary setting. In a subsequent cause of action the setting was of an adversary nature. No comparable qualitative difference exists in the present circumstances. The Oregon action as well as the current action were both of an adversary nature.

In *Standlee* a parolee whose parole had been revoked sought to apply the doctrine of collateral estoppel in the matter of his parole revocation. Previously, the parolee had been found not guilty of second degree assault. The circumstances surrounding the alleged assault gave rise to the revocation hearing. The *Standlee* court held that collateral estoppel did not apply due to a qualitative difference in the degree of the burden of proof. In parole revocation the judge need only be reasonably satisfied

that the terms of parole have been violated. The standard of proof beyond a reasonable doubt applicable in a criminal setting is not the standard in revocation matters. Again no comparable qualitative difference in the degree of the burden of proof exists in the instant case. Mrs. Kelley still bears the burden of proof as to both issues in the case. The statutory presumption will aid her efforts but does not change the degree of proof, that being a preponderance of evidence.

The qualitative difference plaintiff rests upon is absent in the instant case. Thus, there being no qualitative difference and all the other elements of res judicata and collateral estoppel being satisfied, it is determined that plaintiff's action should be dismissed. This being the case, other issues presented in this motion need not be addressed.

Order

IT IS ORDERED that defendant Metropolitan Life Insurance Company's motion to dismiss on the grounds that the doctrines of res judicata and collateral estoppel bar plaintiff's present action is hereby GRANTED. The Clerk will enter judgment accordingly.

DATED this 10th day of June, 1981.

/s/ Smithmoore P. Myers
United States Magistrate

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-77-159 SPM

JEAN KELLEY,

Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

MEMORANDUM AND ORDER

(Filed January 15, 1982)

This is the first case in this district involving an appeal from a decision of the Magistrate to the District Court pursuant to the provisions of 28 U.S.C. 636(c) (4). The parties stipulated that this civil action could be referred to the Magistrate for trial and in the process stipulated that any appeal from the decision of the Magistrate would be to the District Court.

By written order of June 10, 1981, the Magistrate dismissed the action; on the same date the Clerk entered judgment of dismissal.

On June 17, 1981, the plaintiff filed a Motion for Reconsideration seeking the vacation of the Magistrate's Opinion and Order, requesting a trial or in the alternative requesting that the action be reopened to take additional testimony. The motion was based upon several grounds (1) error in the interpretation and application of law gov-

erning issues of res judicata and collateral estoppel, (2) newly discovered evidence and/or legal authority, and (3) that substantial justice had not been done.

By order of September 11, 1981, the Magistrate denied the plaintiff's Motion for Reconsideration. On September 28, 1981, the plaintiff filed a Notice of Appeal from the decision of the Magistrate to the District Court. The defendant then moved to dismiss the appeal as being untimely. All issues have been submitted on briefs without oral argument.

The motion to dismiss the appeal is DENIED. First of all, this Court had not yet promulgated rules governing appeals from the Magistrate to the District Court. It would be basically unfair to a litigant if the Court were to take a technical approach under such circumstances. Moreover, since there was no trial before the Magistrate and in light of the fact there were no rules of appeal promulgated, I could understand that counsel for the plaintiff may have been somewhat uncertain as to precisely how to proceed. However, except for the title of the Motion for Reconsideration, it can be construed as a motion falling within the provisions of Rule 4(a) (4), Federal Rules of Appellate Procedure; I so construe it. Under such circumstances, the Notice of Appeal is timely.

Turning now to the substance of this appeal, I will not recite all of the details in the Magistrate's opinion which resulted in a dismissal. Suffice it to say, that the Magistrate concluded, for reasons detailed in his opinion, that the plaintiff's action was barred under the doctrine of res judicata and/or collateral estoppel. For reasons hereinafter set forth, I respectfully disagree and remand this case to the Magistrate for further proceedings.

It will be unnecessary to recite the facts in this Memorandum as they are adequately summarized in the Magistrate's Order.

The sole issue for review is whether the Oregon litigation bars the present action under the doctrines of res judicata or collateral estoppel. In the Oregon litigation, which was tried to a jury, the jury was instructed, in substance, that in order to return a verdict for the plaintiff the jury would have to conclude (1) that Mr. Kelley was deceased and (2) that his death occurred during the policy period. The jury returned a general verdict for the defendant. The only logical conclusion in my judgment is that the jury concluded that the plaintiff had not presented adequate evidence to overcome the then existing presumption that Mr. Kelley was alive. Obviously, the jury would then not have reached any determination as to the second issue. At the time the Oregon case was tried, the plaintiff was faced with the burden of overcoming a presumption of life. Now, Mr. Kelley's death has been established. See *Jean Kelley v. Metropolitan Life Insurance Company,* slip. op. No. 78-2340 (9th Cir. 1980).

I cannot accept the principle that either the doctrine of res judicata or collateral estoppel is so inflexible as to achieve the result which defendant seeks. Professor Moore, in discussing the danger of inflexibility of the rule and the equities underlying it states:

> In what is here said there is no desire to undermine res judicata. Res judicata is a sound and salutory principle that deserves to be respected and applied. But at times there is considerable truth in the observation that res judicata renders white black, the crooked straight. And an application of a principle,

> albeit the principle is sound, that produces such results may be questioned. Rigidity in applying legal principles, certainly most and probably all such principles, is undesirable. A little flexibility in application can make a common sense accommodation of a sound principle to the particular facts without sacrifice of the principle and with greater justice to all concerned.

1B Moore's Federal Practice, ¶ 0.405[12] at 787, (footnotes omitted). Judge Curtis, when he ruled on this case in March of 1978, in granting summary judgment to the plaintiff, said:

> It should be noted that we are not dealing with the same factual question that was addressed by the jury in Mrs. Kelley's initial lawsuit [the Oregon litigation]. The jury had apparently decided that it had not yet been conclusively established that Mr. Kelley was dead. This fact has now been established by operation of law. I have concluded that although the facts attested to in plaintiff's affidavits were apparently not enough to persuade a jury in 1973 that Mr. Kelley was dead, they are sufficient to establish the time of Mr. Kelley's death, now that his decedence is presumed.

Order Granting Plaintiff's Motion for Summary Judgment, March 31, 1978 at 3.

In reversing Judge Curtis, the Ninth Circuit Court of Appeals concluded that there was an issue of fact as to the time of Mr. Kelley's death. The Circuit specifically declined to pass upon the defendant's contention that res judicata and collateral estoppel applied. That matter was left to the trial court.

I conclude:

(1) That the plaintiff's action is not barred by either res judicata or collateral estoppel for the reason that at the time of the Oregon trial there was a legal presumption that Mr. Kelley was alive. At this time there is no issue regarding death.

(2) Assuming arguendo that the doctrines would apply, equity dictates that they should not be applied. The flexibility in application referred to by Professor Moore is the more equitable approach, particularly in light of the fact that in my judgment the defendant is not thereby prejudiced.

This case is remanded to the Magistrate for further proceedings consistent with this Order and the Ninth Circuit Memorandum cited above.

IT IS SO ORDERED.

DATED this 15th day of January, 1982.

/s/ Robert J. McNichols
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-77-159-JLQ

JEAN KELLEY,

Plaintiff-Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellant.

OPINION AND ORDER

(Filed June 20, 1984)

JURISDICTION

THIS APPEAL is before the court pursuant to 28 U.S.C. § 636(c) (4), the parties having agreed to appeal the Magistrate's decision to this court rather than to the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

In early April 1970, plaintiff's husband left their home in Klamath Falls, Oregon and has not been heard from since. Through his employment he was covered by a life insurance policy issued by the defendant Metropolitan Life Insurance Company (hereinafter Metropolitan Life). Coverage on the policy existed only if death occurred during the term of employment or within thirty-one (31)

days thereafter. Mrs. Kelley filed a claim for payment on the policy but Metropolitan Life has refused to pay insisting there is no proof that her husband died during the period of coverage.

Jean Kelley initially brought suit to collect the policy's benefits in an Oregon state court in 1972. That case resulted in a defense verdict, the jury apparently finding insufficient proof that Mr. Kelley died during the period of coverage.

In 1977, plaintiff filed the present action. It was initially filed in Walla Walla County Superior Court but was then removed to this court. Like the 1972 Oregon state case the complaint sought payment on the policy but unlike the prior action the plaintiff relied on an Oregon seven-year statutory presumption of death. After denying defendant's motion to dismiss based on *res judicata* and collateral estoppel, United States District Judge Jesse Curtis granted plaintiff's motion for summary judgment, finding that the statutory presumption of death governed and that uncontradicted affidavits showed that death occurred while the policy was in effect. On appeal, the Ninth Circuit reversed, holding that plaintiff had failed to establish the absence of a genuine issue of fact as to the specific date of death. In remanding the case for trial the court expressly did not address the *res judicata* or collateral estoppel issues saying "the district court has the opportunity to consider those contentions, again, on remand."

On remand, the parties consented to having the case heard by a United States Magistrate with any appeal to be taken to a judge of this court rather than to the Court

of Appeals. On June 10, 1981 United States Magistrate Smithmoore P. Myers entered an Order dismissing plaintiff's action, having concluded that the defense verdict in the Oregon state case barred this suit. On appeal, United States District Judge Robert McNichols reversed the Magistrate, holding that the case before this court presented issues different from the Oregon state action and therefore was not barred by collateral estoppel or *res judicata.* Defendant petitioned the Ninth Circuit for review but leave to appeal was denied.

On its second remand, the case was once again before the Magistrate. On June 1, 1983 partial summary judgment was granted in defendant's favor, dismissing two of plaintiff's claims, an alleged violation of the Oregon Insurance Code and the tort of outrage. At jury trial the next week, the Magistrate made two premilinary rulings which are at issue on this appeal: (1) that *res judicata* was no longer an issue because Judge McNichols had ruled it inapplicable; and, (2) that "fact of death" was also no longer an issue because the Ninth Circuit had remanded the case for a trial as to the *time of death* but had left intact Judge Curtis' finding as to the *fact of death.* After a two day trial the jury found that Mr. Kelley's death occurred during the period of coverage under the policy and awarded plaintiff a verdict in the amount of $27,500 plus interest.

Metropolitan Life filed a notice of appeal to the Ninth Circuit and Mrs. Kelley filed a cross-appeal. Upon stipulation by the parties that the appeal would be heard by this court, the circuit dismissed the appeals. The issues have been fully briefed and were argued before this court in Spokane, Washington on March 30, 1984.

DISCUSSION

The issues on appeal are straightforward. Although appellant lists twenty (20) issues in its Statement of Issues, the argument in support thereof reveals that its appeal really focuses on three (3) grounds. The first two arise out of the pretrial rulings by the Magistrate that *res judicata*/collateral estoppel and the "fact of death" were no longer issues before the court. The third ground for Metropolitan Life's appeal challenges the jury's verdict that Mr. Kelley died during the policy's coverage as not being supported by the evidence. Mrs. Kelley's cross-appeal alleges error in the Magistrate's dismissal of her tort-of-outrage claim.

A. *Metropolitan Life's Appeal:*

1. *Law-of-the-case doctrine:*

Metropolitan Life's challenges to the Magistrate's pretrial rulings in regard to the *res judicata*/collateral estoppel and "fact of death" issues raise but a single legal question. The sole question is whether the law-of-the-case doctrine foreclosed further consideration of those two issues.

The law-of-the-case rule ordinarily precludes a court from re-examining an issue previously decided by the same court, or a higher appellate court, in the same case. *Moore v. Jos. H. Matthews & Co.*, 682 F.2d 830, 833 (9th Cir. 1982). In other words, the decision of an appellate court must be followed in all subsequent proceedings in the same case at either the trial or appellate level. *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d 938, 949 (9th Cir. 1983). The discretion of a

court to review earlier decisions in a case should be exercised sparingly so as not to undermine the salutory policy of finality that underlies the rule. *Moore v. Jos. H. Matthews & Co.*, 682 F.2d at 834.

It is undisputed that both the *res judicata*/collateral estoppel issue and the "fact of death" issue have been ruled upon in an earlier stage of this protracted case. In 1978 Judge Curtis ruled that the statutory presumption of death governed, meaning that the "fact of death" was conclusively presumed; this part of his decision was left intact by the Ninth Circuit. Similarly, in 1982 Judge McNichols, sitting as an appellate court, held that neither collateral estoppel nor *res judicata* barred the present action; that holding has not been reviewed and like Judge Curtis' ruling, remains the law of this case. As such, this court must follow it " 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues or the decision was clearly erroneous and would work a manifest injustice.' " *Planned Parenthood of Central and Northern Arizona v. State of Arizona*, 718 F.2d at 949. (Citation omitted). None of those three exceptions to application of the doctrine are present here. Consequently, the prior rulings on the *res judicata*/collateral estoppel and "fact of death" issues must stand and the court concludes the Magistrate correctly excluded them from the case.

2. *Sufficiency of the evidence:*

Metropolitan Life appeals the jury's verdict that Mr. Kelley died during the policy's coverage as not being supported by the evidence. As a general rule the sufficiency

of the evidence is not reviewable on appeal unless a motion for a directed verdict was made in the trial court, both at the close of plaintiff's case and then renewed at the close of all the evidence. Wright & Miller, *Federal Practice and Procedure,* § 2536 (1971 & 1984 supp.). Although appellant did move for a directed verdict at the close of Kelley's case, appellant neither renewed the motion at the close of the case nor moved for judgment notwithstanding the verdict. Fed.R.Civ.P. 50. In the absence of those motions, the sufficiency of the evidence supporting the jury's findings is not reviewable on appeal, *Trans World Airlines, Inc. v. Shirley,* 295 F.2d 678 (9th Cir. 1961); *Zimmerman v. Emmons,* 225 F.2d 97 (9th Cir.), *cert. den.,* 350 U.S. 932 (1956); *accord, Budge v. Post,* 643 F.2d 372, 374 (5th Cir. 1981), unless there was no evidence to support the jury's verdict which, if left undisturbed, would result in "manifest injustice". *See, Taylor v. Sentry Life Insurance Co.,* 729 F.2d 652 (9th Cir. 1984); *Helm v. State of California,* 722 F.2d 507 (9th Cir. 1983).

In this case there was indeed some evidence to support the verdict. For example, the unexplained blood-like stains in the bed of the deceased's truck, the absence of fingerprints on the truck, and the fictitious name signed by the deceased on a gas credit card charge slip is all evidence which leads this court to conclude that allowing the jury's verdict to stand will not perpetuate any "manifest injustice".

B. *Kelley's Cross-Appeal:*

Kelley appeals from the Magistrate's dismissal of her tort-of-outrage claim. She argues that under Oregon law the tort of outrage is based on a factual showing of bad

faith and extremely outrageous conduct. Thus, according to Kelley, summary judgment was inappropriate since there were genuine issues of material fact in dispute as to whether Metropolitan Life's conduct in refusing to pay the claim was indeed in "bad faith" and "outrageous".

Applying Oregon law the Magistrate ruled that as a matter of law Metropolitan Life's conduct did not rise to the level of being in bad faith or outrageous. His conclusion came after a review of the Oregon caselaw concerning the tort of outrage and the undisputed facts of this case. Additionally, although one fact was in dispute (involving a potentially damaging statement allegedly made by a employee of Metropolitan Life) the Magistrate "accepted plaintiff's version of this incident" and he still concluded that "it does not, in my view, transform what the record shows to be a vigorous but reasonable defense [to not paying the claim] into bad faith or outrageous conduct." In other words, the Magistrate concluded that even if Metropolitan Life had acted as the plaintiff alleged, such conduct, as a matter of Oregon law, would not satisfy the elements of the tort of outrage. In essence the Magistrate found that the evidence would compel a directed verdict or judgment n.o.v. against the plaintiff. In such cases as this where the issue of "outrageous" conduct is a mixed question of law and fact (so-called "ultimate fact") and the evidence would compel a directed verdict or judgment n.o.v. against the opponent of the motion, then summary judgment is appropriate. *See v. Durang,* 711 F.2d 141 (9th Cir. 1983); *THI-Hawaii v. First Commerce,* 627 F.2d 991 (9th Cir. 1980), *cited* in 99 F.R.D. 465 (1984), William W. Schwarzer, "Summary Judgment Under The Federal Rules: Defining Genuine

Issues of Material Fact". The Magistrate's granting of Metropolitan's motion for summary judgment was not in error.

———o———

CONCLUSION

As discussed above, the court concludes: (1) the law-of-the-case doctrine precluded Metropolitan Life from continuing to assert the *res judicata*/collateral estoppel and "fact of death" issues; (2) the sufficiency-of-the-evidence challenge was not properly before this court nor did the verdict result in a "manifest injustice"; finally, (3) the court concludes that the tort-of-outrage claim was appropriately dismissed by summary judgment. Accordingly, the rulings and judgment of the Magistrate are AFFIRMED and the jury's verdict shall stand as entered.

DATED this 20th day of June, 1984.

/s/ Justin L. Quackenbush
United States District Judge

APPENDIX F

UNITED STATES CONSTITUTION:

ARTICLE III

§ 1. *Judicial power; tenure of office*

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

§ 2. *Jurisdiction*

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

ARTICLE IV

§ 1. *Full faith and credit among states*

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

AMENDMENT V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall . . . be deprived of life, liberty, or property, without due process of law.

UNITED STATES CODE, TITLE 28:

§ 636. Jurisdiction, powers and temporary assignment

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(b) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. . . .

. . . .

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and inexpensive. The district court may affirm, reverse, modify or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objection to the judgment. Nothing in this paragraph shall be construed to be a limitation of any party's right to seek review by the Supreme Court of the United States.

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory, or Possession, of copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

OREGON REVISED STATUTES, EVIDENCE CODE:

§ 40.120 Rule 308. *Presumptions in civil proceedings.* In civil actions and proceedings, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

§ 40.135 Rule 311. *Presumptions.* (1) The following are presumptions:

. . . .

(s) A person not heard from in seven years is dead.

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FILED
JAN 22 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1085

In The
Supreme Court of the United States
October Term, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Petitioner,

vs.

JEAN KELLEY,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 19, 1985

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QUESTIONS PRESENTED

1. Whether (a) the decisions below are contrary to the decisions from other courts, (b) there is need for a uniform rule on point, or (c) the case at bar involves principles which are of importance to the public at large or concern only the parties to this case.

2. Whether the federal courts' failure in a diversity action to provide standards for the review by Article III judges of proceedings before a magistrate under 28 U.S.C. § 636 violates Article III of the U.S. Constitution and denies due process to defendant.

3. Whether the federal courts' refusal on equitable grounds to invoke res judicata violates the federal court's obligation to give full faith and credit to a state court decision.

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2. Whether The Federal Courts' Failure In A Diversity Action To Provide Standards For The Review By Article III Judges Of Proceedings Before A Magistrate Under 28 U.S.C. § 636 Violates Article III Of The U.S. Constitution And Denies Due Process To Defendant. 3

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No. 84-1085

In The

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Most of the Metropolitan Statement of the Case is correct. Those few corrections or additions that are necessary are set out as follows:

1. Metropolitan states that "In late 1969, Mr. Kelley had renewed his relationship with a woman living in For-

est Grove, Oregon." Metropolitan Brief, Page 3. The woman testified at trial in 1973 and was deposed in 1980. She testified on both occasions that she had neither seen nor heard from Richard Keith Kelley since prior to his unexplained disappearance in April, 1970.

2. Following the unexplained disappearance of Richard Keith Kelley in April, 1970, two private investigators were hired to locate him. No evidence concerning Richard Keith Kelley following his disappearance has been found. No one has come forward with any evidence that Richard Keith Kelley has been seen or heard from since his disappearance in 1970.

3. When the Court of Appeals, in September, 1980, reversed and remanded the 1978 Summary Judgment issued by Judge Curtis, it ruled that "Kelley submitted evidentiary affidavits on [the issue of death] which, in addition to the aforementioned presumption, effectively established the fact of Mr. Kelley's death." Metropolitan Petition, Appendix B.

4. On February 6, 1981, Metropolitan and Kelley both consented to proceed before a United States Magistrate and take any appeal to the District Court. Appendix A.

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REASONS FOR DENYING THE WRIT

1. Whether (A) The Decisions Below Are Contrary To The Decisions From Other Courts, (B) There Is Need For A Uniform Rule On Point, Or (C) The Case At Bar Involves Principles Which Are Of Importance To The Public At Large Or Concern Only The Parties To This Case.

Petitions for certiorari are brought pursuant to 28 U.S.C. §1254. Certiorari is to be exercised sparingly, and only in cases of gravity and general importance, or those involving substantial constitutional questions. *Zucht v. King,* 260 U.S. 174, 176, 67 L.Ed. 194, 43 S. Ct. 24, 25 (1922); *Fields v. U.S.,* 205 U.S. 292, 296, 51 L.Ed. 807, 27 S. Ct. 543 (1907). Certiorari will be granted to review a judgment when it is contrary to decisions from other courts, and there is need for a uniform rule on point. *Commissioner v. Bilder,* 369 U.S. 499, 501, 8 L.Ed. 2d 65, 82 S. Ct. 881 (1962). Certiorari is granted only in cases involving the resolution or settlement of principles which are of importance to the public at large, as distinguishable from the parties to the case. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 99 L.Ed. 897, 75 S. Ct. 614 (1955); *NLRB v. Pittsburg S.S. Co.,* 349 U.S. 498, 95 L.Ed. 479, 71 S. Ct. 453 (1951).

In the case at bar, Federal District Court Judges McNichols and Quackenbush, in their capacity as appellate judges, did not make new law at odds with decisions in other courts or a uniform course of decisions previously decided; they did not address the issue of the constitutionality of any state or federal statute; they did not decide a case of grave, general importance. As such, and on the authority cited, certiorari should be denied.

2. Whether The Federal Courts' Failure In A Diversity Action To Provide Standards For The Review By Article III Judges Of Proceedings Before A Magistrate Under 28 U.S.C. § 636 Violates Article III Of The U.S. Constitution And Denies Due Process To Defendant.

Metropolitan has not challenged the constitutionality of the Federal Magistrate Act, 28 U.S.C. §631, et seq, the

constitutionality of which has been upheld by this Court. *See U.S. v. Raddatz,* 447 U.S. 667, 65 L.Ed. 2d 424, 100 S. Ct. 2406 (1980). Nor does Metropolitan claim that it was required, over its objection, to have this matter tried by a magistrate and to take an appeal to the District Court. Metropolitan voluntarily consented to proceed before a magistrate and to take any appeal to the District Court. Appendix A. Appeals from a magistrate may be taken to a judge of a district court in the same manner as on an appeal from a judgment from a district court to a court of appeals. 28 U.S.C. §336 (c)(4). An appeal from a district court to a court of appeals is taken pursuant to 28 U.S.C. §1291.

The gravamen of the claim made by Metropolitan for granting the writ is that it was not afforded adequate notice of grounds for review of the magistrate's decisions. Metropolitan relies on *Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 73 L.Ed. 2d 598, 102 S. Ct. 2858 (1982), which case dealt with the issue of jurisdiction of the bankruptcy courts. *Northern Pipeline Co. v. Marathon Pipe Line Co.* had absolutely nothing to do with the Federal Magistrate Act or consents to proceed before a magistrate and is distinguishable from the case at bar.

On June 10, 1981, the magistrate entered judgment granting Metropolitan's Motion to Dismiss. Kelley took an appeal from that judgment to the District Court. On October 9, 1981, counsel for Metropolitan and Kelley had a telephone conference with Judge Robert J. McNichols to discuss the procedure to follow in the appeal. The clerk's office in the District Court, Eastern District of Washington, has a record of that conference call. No transcript or recording of the telephone conference was made. Kelley filed her appeal brief on October 26, 1981. On November

12, 1981, an agreed order for extension of time for Metropolitan to file its brief was filed with the Court. On November 30, 1981, Metropolitan filed its brief.

Oral argument via telephone conference with Judge McNichols was held on January 3, 1982. A Memorandum and Order was filed by Judge McNichols on January 15, 1982. Appendix D, Metropolitan Brief.

On February 1, 1982, Metropolitan filed a Notice of Appeal with the Court of Appeals, Ninth Circuit. It was treated as a Petition for Leave to Appeal. On June 10, 1982, the Court of Appeals, Ninth Circuit, filed an Amended Order, which set out a briefing schedule for the parties. In addition, the Order referenced Ninth Circuit R30, which sets forth the procedure to be followed for discretionary appeals pursuant to 28 U.S.C. §636 (c)(5). Appendix B. Metropolitan and Kelley both filed memoranda with the Court. On August 10, 1982, the Ninth Circuit filed an order denying the Metropolitan Petition for Permission to Appeal.

Trial was held in June, 1983. On June 9, 1983, the magistrate entered an Order on Jury Verdict. Metropolitan filed a Notice of Appeal to the Court of Appeals, Ninth Circuit, on July 1, 1983. On July 13, 1983, Kelley filed a Notice of Cross Appeal with the District Court, Eastern District of Washington. On July 21, 1983, Judge Justin L. Quackenbush, of the District Court, Eastern District of Washington, ordered that, pursuant to stipulation signed by Metropolitan and Kelley, the appeal would be taken to the District Court. On October 7, 1983, on signed stipulation of Metropolitan and Kelley, the Court of Appeals, Ninth Circuit, filed an order dismissing the appeal to the Ninth Circuit.

Judge Quackenbush, in his capacity as an appellate judge, entered an order on November 18, 1983, setting out the appeal schedule, and ordered that the appeal would "proceed in the manner prescribed in the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit." Appendix C. Subsequently, Metropolitan was granted two extensions of time to file its brief. When its brief was filed, Metropolitan made twenty assignments of error. No reference of any kind was made that Metropolitan had been denied due process by virtue of not being afforded adequate notice of grounds for review of the Magistrate's decisions.

Oral argument was held on March 30, 1984. On June 20, 1984, Judge Quackenbush affirmed the rulings of the Magistrate and jury verdict. Metropolitan filed a Motion for Consideration which was heard by telephone conference on July 24, 1984. The motion was denied on July 26, 1984.

Metropolitan filed a Petition for Leave to Appeal to the Court of Appeals, pursuant to 28 U.S.C. §636 (b)(5), on November 5, 1984. Briefs were submitted by Metropolitan and Kelley. On October 9, 1984, the Court of Appeals, Ninth Circuit, entered an Order Denying Petition for Leave to Appeal.

Metropolitan has been afforded and has utilized all process that it is due. All issues, legal and factual, have been exhaustively researched, briefed, argued and appealed. Kelley and Metropolitan both took appeals from the magistrate to the District Court in its capacity as an appellate court. Metropolitan filed two petitions for leave to appeal with the Court of Appeals, Ninth Circuit. The petitions were timely filed, briefed and denied, for the

reason that Metropolitan failed to demonstrate that the issues on appeal were substantial enough to warrant review or that review was necessary to serve the ends of justice. How can Metropolitan now claim, in light of this procedural history, that it has been denied due process?

3. Decisions Below Did Not Fail To Give Full Faith And Credit To The Decision Of A State Court For The Reason That State Law Allowed Kelley To Relitigate Her Case. Full Faith And Credit Need Not Be Given To A Judgment To Which The Laws Of The Issuing State Would Not Give Res Judicata Effect.

It does not violate Article IV, §1 of the United States Constitution, or 28 U.S.C. §1738, to refuse to give res judicata effect to a judgment of a state court that is itself not res judicata to a subsequent action. *See, e. g., Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270, 65 L.Ed. 2d 757, 100 S. Ct. 2644, 2655 (1980); *Ackerman v. Ackerman*, 676 F.2d 898 (2d Cir. 1982).

In support of its full faith and credit claim, Metropolitan cites *Kremer v. Chemical Construction Co.*, 456 U.S. 461, 72 L.Ed. 2d 262, 102 S. Ct. 1883 (1982). That case does not articulate a categorical rule for all cases. It reasons only that a final judgment on the merits prevents a party from relitigating issues that were or could have been raised in the earlier action. In the case at bar, application of Or. Rev. Stat. §40.130 (Evidence Code Rule 311), the Seven Year Presumption of Death, and the Order of the Court of Appeals, Ninth Circuit, dated September 10, 1980, which held that Richard Keith Kelley was dead, created burdens of proof and legal issues that were not and could not have been raised in the 1972 action.

Metropolitan argues that the 1973 judgment was res judicata to the 1977 action. According to Oregon law, the appropriate test to be used to decide the issue of res judicata is "the same evidence test." According to that test, it must be decided "whether the second action is based upon the same transaction and the evidence needed to sustain the second action would have sustained the first." *Western Baptist Home Mission Board v. Griggs,* 284 Or. 204, 210, 433 P.2d 252, 255 (1967). The 1983 Kelley trial did involve the "same transaction" as the 1973 trial. However, because Mr. Kelley was presumed dead at the time of the 1983 trial (in fact, *was dead* according to the mandate of the Ninth Circuit), the evidence needed to sustain the 1983 trial was different than the 1972 action. Therefore, the 1972 action was not res judicata to the 1983 trial. *See Segal v. American Telephone & Telegraph Co., Inc.,* 606 F.2d 842, 845 (9th Cir. 1979); *Newport News Shipbuilding & Dry Dock v. Director,* 583 F.2d 1273, 1279 (4th Cir. 1978), *cert. denied,* 440 U.S. 915, 59 L.Ed. 2d 465, 99 S. Ct. 1232 (1979).

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L.Ed. 2d 103, 101 S. Ct. 2424 (1981), cited by Metropolitan, is distinguishable from the case at bar. That case did not involve a second action with different evidentiary predicates. It involved a failure to appeal and an exception to the finality of a party's failure to appeal. Under the facts of that case, the Supreme Court argued that "This Court's rigorous application of res judicata . . . makes clear that this Court recognizes no general equitable doctrine, such as that suggested by the Court of Appeals, which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely

interwoven' with those of another party." 452 U.S. at 400.

The case at bar does not involve a party's failure to appeal. This case involves a change in the burden of proof, changes in applicable rules of evidence, and application of Oregon law that recognizes situations wherein res judicata is not a bar. *Western Baptist Home Mission Board v. Griggs,* 284 Or. 204, 210, 433 P.2d 252, 255 (1967).

Metropolitan never took an appeal, or filed a Petition for a Writ of Certiorari, following issuance of the Court of Appeal's Order filed September 20, 1980, which order held that Richard Keith Kelley was dead. That September 10, 1980 Order was the law of this case in 1983. *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 833 (9th Cir. 1982). It had to be followed in all subsequent proceedings in the same case at either the trial or appellate levels. *Planned Parenthood of Central and Northern Arizona v. State of Arizona,* 718 F.2d 938, 949 (9th Cir. 1983). The magistrate and the District Court were required to follow the holding of the Ninth Circuit "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues or the decision was clearly erroneous and would work a manifest injustice." *Planned Parenthood of Central and Northern Arizona v. State of Arizona,* 718 F.2d at 949 (citation omitted). Since none of these three exceptions applied to the case at bar, Magistrate Myers and Judge Quackenbush both held that the ruling of the Court of Appeals, Ninth Circuit, would stand and that the fact of Richard Keith Kelley's death should be, or was properly, excluded from the 1983 trial.

This Court should deny review. Metropolitan was not denied due process and the lower courts have not refused to give full faith and credit to the decision of an Oregon court.

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CONCLUSION

For the reasons discussed above, the Metropolitan Petition for Writ of Certiorari should be denied. The case at bar is not one of particular gravity or general importance. The decisions of the lower courts are not contrary to decisions from other courts, nor is there need for a uniform rule on point. In addition, the issues sought to be resolved by Metropolitan involve only the parties to this case and are of no importance to the public at large. Furthermore, Metropolitan has utilized all procedures available to it and has not been denied due process. Full faith and credit need not be given to the 1973 Oregon judgment for the reason that Oregon law recognizes that the judgment should not be given res judicata effect.

DATED this 18th day of January, 1985.

Respectfully submitted,

/s/ James K. Hayner

/s/ Tom Scribner

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Counsel of Record

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-77-159

JEAN KELLEY,

Plaintiff(s),

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Defendant(s).

CONSENT TO PROCEED BEFORE
A UNTED STATES MAGISTRATE

(Filed February 6, 1981)

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil proceeding hereby waive their right to proceed before a Judge of the United States District Court and consent to have Magistrate Smithmoore P. Myers conduct all further proceedings in the case, including the trial of the case, and order the entry of judgment.

The parties are aware of the fact, that unless they now stipulatc to take any appeal to a judge of the District Court, any appeal from the judgment lies directly to the United States Court of Appeals for this Circuit in the same manner as an appeal from any other judgment of the District Court. The parties in this case agree to take any appeal to the District Court.

MINNICK, HAYNER &
ZAGELOW, P.S.

/s/ James K. Hayner
Of Attorneys for Plaintiff
2/5/81
William M. Tugman
Attorney for Defendant
Attorneys
11/10/80

* * *

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to the office of the United States Magistrate Smithmoore P. Myers. The Magistrate will conduct all further proceedings and enter judgment in accordance with 28 U.S.C. § 636(c) and the foregoing consent of the parties.

/s/ Smithmoore P. Myers
United States District Judge
2/6/81

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 82-3076

DC# CV 77-159 M
Eastern Washington (Seattle)

JEAN KELLEY,

Plaintiff-Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a New York corporation,

Defendant-Appellant.

Before: ANDERSON and ALARCON, Circuit Judges

AMENDED ORDER

(Filed June 10, 1982)

The court's order of May 27, 1982 is amended to read as follows:

It appears that the parties consented pursuant to 28 U.S.C. § 636(c) to a trial before a magistrate and an appeal to the district court. 28 U.S.C. § 636(c)(5) requires that a petition for leave to appeal be filed in this court if a party desires further judicial review.

9th Cir. R. 30 sets forth the procedure to be followed for discretionary appeals pursuant to 28 U.S.C. § 636 (c)(5). Because this rule became effective after the notice of appeal was filed, the court treats the notice of appeal filed by defendant on February 1, 1982 as a petition for leave to appeal. On or before fourteen (14) days from the entry of this order, defendant shall file a memorandum in

support of the petition. On or before seven (7) days after the memorandum in support of the petition is filed, plaintiff shall file a memorandum of response. The briefing schedule previously established for the appeal shall be held in abeyance pending the court's consideration of the petition and memoranda.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. C-77-159-JLQ

METROPOLITAN LIFE INSURANCE COMPANY, a New York Corporation,

Appellant, Cross-Appellee

vs.

JEAN KELLEY,

Appellee, Cross-Appellant

ORDER

(Filed November 18, 1983)

A telephonic conference was held on November 18, 1983. The appellant was represented by William Tugman; Tom Scribner appeared on behalf of appellee.

This matter shall proceed as follows:

1. Appellant shall serve and file its brief on or before December 30, 1983.

2. Appellee shall file her response and brief in support of her cross-appeal on or before January 30, 1984.

3. On or before February 13, 1984, appellant shall serve and file its reply brief and response to the cross-appeal.

4. Appellee shall file her reply to appellant's response brief on or before February 27, 1984.

5. Oral arguments will be heard in Spokane, Washington, at 10:00 A.M., March 30, 1984. Argument will be limited to a total of thirty (30) minutes per party.

6. This appeal shall proceed in the manner prescribed in the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals For The Ninth Circuit.

7. All briefs and other papers shall be captioned and numbered as set forth in this Order.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 18th day of November, 1983.

/s/ Justin L. Quackenbush
United States District Judge